Supreme Court, U.S.
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No. 98-1695

IN THE

Supreme Court of the United States

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, *et al.*,

Petitioners,

v.

PRINCE GEORGE CENTER, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

RESPONDENTS CLASS PLAINTIFFS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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STATEMENT PURSUANT TO RULE 29.6 STATEMENT

Neither Respondent Class Plaintiff has a parent corporation, and no publicly held company owns 10% or more of the stock of either Respondent.

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Respondents Class Plaintiffs Prince George Center, Inc., and MBL Life Assurance Corporation ("Respondents") oppose Prudential Insurance Company's ("the Pru") *certiorari* petition because its alleged loss of property was not by reason of any asserted Due Process Clause violation in the Pennsylvania courts, but rather the direct consequence of the Pru's own grossly negligent failure to protect its property by following simple state court procedure. The Pennsylvania trial court, having heard the facts, "declined Prudential's petition in equity to afford it relief *from its own failure to avoid a judgment entered against it*." Petition at 10a (emphasis added). In what the Pru concedes is a "unique" and thus a highly fact-specific case, the reality of the lower courts' findings is that despite its receiving from the Pennsylvania courts *the full measure of Due Process*, the Pru has been its own worst enemy, as to which plight this Court's writ is, we submit, unavailing. Joining in full the separate, joint opposition filed by co-respondents, Respondents wish to emphasize two fundamental reasons why the Pru's petition must be denied.[1]

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1. Co-respondents U.S. Gypsum and W.R. Grace are two of the four defendants with whom the class plaintiffs/respondents settled on behalf of what the lower court called the "trial class." *See* Petition at 23a-24a (hereafter "Trial Class" to avoid confusion). Co-respondents also oppose the Pru's petition. Respondents hereby join in the reasons for denying the petition expressed in co-respondents' joint brief in opposition.

REASONS FOR DENYING THE WRIT

I. NEITHER OF THE QUESTIONS PRESENTED, WHICH ARE BASED UPON AN ASSERTED LOSS OF PROPERTY BY REASON OF ALLEGED DUE PROCESS CLAUSE VIOLATIONS IN THE STATE COURTS, IS BEFORE THIS COURT, BECAUSE THE ALLEGED LOSS OF PROPERTY HERE IS EXCLUSIVELY THE RESULT OF PETITIONER'S OWN INEXCUSABLE FAILURE TO PROTECT ITSELF BY FOLLOWING THE SIMPLE STATE OPT-OUT PROCEDURE SET FORTH IN THE COURT NOTICES IT RECEIVED.

The fundamental premise of the petition is that this matter is an appropriate vehicle for addressing in omnibus fashion the constitutional rights of absent class members in nationwide class actions situate in state courts. The facts of record, however, belie that premise. At its core, this private dispute merely concerns the Pru's own inexplicable but nonetheless inexcusable failure, after receiving formal court notices, to take appropriate steps to avoid the compromise and extinguishment, by the subject Pennsylvania state court Trial Class action settlement and judgment, of the Pru's individual asbestos-property-damage lawsuit in New Jersey federal court against four asbestos manufacturers, who were also Trial Class defendants below, including co-respondents Grace and U.S. Gypsum.

The Pru's petition asks this Court to convene improperly as a *third* court of appeals to review alleged "errors," including alleged factual errors, following review

by both appellate courts in Pennsylvania. *See National Collegiate Athletic Ass'n v. Board of Regents*, 458 U.S. 613, 623 (1984) (noting Court's "reluctance to disturb findings of fact concurred in by two lower courts"). Equally important, the Pru invites this Court to do so on bizarre facts concerning the Pru's gross misfeasance (and Pru's in-house and outside counsel's inadequate representation of the Pru) in failing to respond timely to formal court notices and thereby execute its ostensible intent to opt out of the Pennsylvania class action so as to preserve its New Jersey lawsuit. *See, e.g., Vasquez v. United States*, 454 U.S. 975, 977 (1981) ("appropriate to decline to review a decision that turns on details of the evidence that are not likely to be duplicated in other cases").

Even the Pru has conceded that "the totality of these facts will never be repeated" and that the "circumstances of this case are unique." [2] So desperate was the Pru's plight in the wake of its inexcusable neglect that its petition seeking relief from the final state court judgment rested on the audacious claim that a "fraud" had been perpetrated by *counsel* for Grace and U.S. Gypsum by their failing to help *the Pru's counsel* to preserve the Pru's New Jersey claims against their clients by filing a timely opt-out from the Pennsylvania class action.

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2. Petition for Allowance of Appeal of The Prudential Insurance Company of America *et al.*, *Prince George Center, Inc. v. United States Gypsum Co.*, No. 0637 E.D. Allocatur Docket 1997, Supreme Court of Pennsylvania, dated December 22, 1997 (hereafter "Allocatur Petition"), at 4, 26; Brief for Appellants The Prudential Insurance Company of America *et al.*, *Prince George Center, Inc. v. United States Gypsum Co.*, 704 A.2d 141 (Pa. Super. 1997), dated April 28, 1997 (hereafter "Brief for Appellants"), at 3. For the convenience of the Court, a copy of each of these appellate briefs by the Pru has been lodged with the Clerk.

All three Pennsylvania courts, however, refused to allow the Pru to "spin" the blame away from itself. The trial court, surveying the undisputed facts, found that the Pru, having opted out of the Settlement Class portion of the action in the same state court in April 1995 through in-house counsel, had no valid explanation "why at least one of the five USPS-delivered notices [concerning settlement of the Trial Class action] failed to get through to corporate house counsel." Petition at 37a. For the trial court, there was only one valid conclusion on this record (Petition at 43a):

> [D]efendants did not "sandbag" Pru. To the extent it operated in the dark, it pulled the curtain down on itself.

The Superior Court expressly affirmed the trial court as to the Pru's inexcusable carelessness. The Superior Court concluded that "Prudential received actual notice of this class action" and did not overcome "the presumption that these [five Trial Class action settlement] notices were, in fact, delivered." Petition at 15a. The Superior Court found (Petition at 9a) (emphasis added):

> Prudential was aware of the existence of this action and the proper method for extricating itself from it. Indeed, it utilized the form provided with the notice of the first proposed settlement to decline participation in that settlement. Prudential admits it received professional advice on this aspect of the litigation *and had a letter drafted* [Petition at 61a] *which would have avoided the possibility of it unwittingly being bound to any future judgment in this case.*

Accordingly, the Superior Court had no difficulty sustaining the trial court's discretion to decline "to afford [the Pru] relief from its own failure to avoid a judgment entered against it." Petition at 10a. In a pointed conclusion that spoke volumes about the paucity of the Pru's appellate arguments, including its assertion that its predicament was the result of constitutionally defective notice, the Superior Court specifically *sustained* the trial court's conclusion that "[t]o the extent [Prudential] operated in the dark, it pulled the curtain down on itself. . . ." Petition at 12a.[3]

In sum, the unique facts underlying this petition are: since 1987 the Pru was prosecuting its own assertedly valuable asbestos-property-damage claims in New Jersey. In April 1995 the Pru received notice from the trial court of the settlement of the Settlement Class action and an opportunity to opt out of that settlement. The Pru's in-house counsel, Mr. Lauer, filed a timely opt-out request as to the Settlement Class. Petition at 59a. By that same April 1995 notice, *the Pru was also put on actual notice by the trial court of the fact that several of its New Jersey claims were also claims included in the Pennsylvania Trial Class action.*[4]

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3. The Pru's effort to avoid or reverse these devastating findings against it by both the trial court and the Superior Court was rebuffed in the Supreme Court of Pennsylvania, which denied the Pru's Allocatur Petition.

4. The 1995 notice of the settlement of the Settlement Class action (*see* Petition at 4a-5a), to which the Pru responded with an opt-out request on April 28, 1995 (Petition at 59a), also described the *Trial Class* action in detail at Part 1. of the notice, captioned "Description of the Litigation." The identities of Grace and U.S. Gypsum, among the four defendants in the Trial Class, are made clear, as is the fact that the Trial Class embraced buildings, such

(Cont'd)

The Pru, through in-house and outside counsel, has averred its intent to opt out of the Trial Class by drafting and sending a letter on or about May 10, 1995, to the trial court's prothonotary. Petition at 61a.[5] By its own admitted mistake, however, that opt-out letter was never sent. In 1996, the Pru received actual notice from the trial court that it must opt out of the Trial Class. Again by mistake, responsible persons at the Pru did not forward that opt-out notice to the Pru's in-house counsel.

The Pru (through its in-house counsel) admits that between May 1995 and September 13, 1996, it "regarded the action as a closed issue for Prudential, gave it no further thought . . . ," and "did not monitor the action." [6] The Pru failed to take even the most elementary of follow-up actions in the wake of its intended opt-out letter of May 1995, which was designed to be delivered "**VIA CERTIFIED MAIL**

(Cont'd)
as several of the Pru's buildings at issue in the New Jersey action, that had been leased within the stated time period to the federal government and contained asbestos products sold or manufactured by the Trial Class defendants, the same defendants that are in the New Jersey action.

5. The trial court, noting the Pru's assertion that the May 1995 letter was drafted for the purpose of opting out of the Trial Class, observed that there was an alternative inference, namely, that the Pru "was contemplating the possibility it would be better off as a member of the trial class than as an individual litigant." Petition at 26a; 52a.

6. Affidavit of Steven A. Lauer in Support of Petition for Declaratory Relief, dated September 30, 1996, at 5; Volume III of Reproduced Record, *Prince George Center, Inc. v. United States Gypsum Co.*, 704 A.2d 141 (Pa. Super. 1997), at 1145a; Supplemental Affidavit of Steven A. Lauer in Support of Petition for Declaratory Relief, dated October 28, 1996, at 2; *id.* at 1161a.

R.R.R." both to the court prothonotary and to class counsel. Petition at 61a-62a. The Pru's counsel evidently did not bother to check its mail thereafter for the two U.S. Postal Service *return receipts* that proper mailing and delivery of the May 1995 letter would have generated. Had the Pru done so, it would have realized – in plenty of time to cure its mistake – that its opt-out letter had never been sent.

This tragic comedy of errors by the Pru, we submit, alone renders this petition devoid of merit. Because of it, this Court could never properly reach the Due Process Clause questions set forth in the Questions Presented. The findings by two lower courts, now unassailable, are that the Pru *twice* received actual formal notice that the Trial Class action subsumed what the Pru believed were valuable choses in action it was pursuing in another court. By failing to send the May 1995 letter opting out of the Trial Class, the Pru bungled one effort to protect those New Jersey claims. The Pru could have cured its first, 1995 mistake by acting diligently with respect to the opt-out notice it received in 1996, but it fumbled the ball a second time.

Thus, absent its palpable negligence in protecting the New Jersey claims, the Pru, by its own words and deeds, would have timely opted out of the Trial Class. In that event, obviously, there would never have been an occasion, nor would the Pru have had the standing, for it to challenge under the Due Process Clause the adequacy of notice of the Trial Class settlement or of Trial Class counsels' representation. That the Pru received actual notice thus renders moot its claim that the notice was constitutionally defective.[7] The Pru's claims in New Jersey were

7. The petition incorrectly suggests that the notice procedure employed by the trial court was without rationale. The facts of (Cont'd)

compromised and extinguished not by reason of any failure of the formal notices to reach the Pru, but by Pru's failure to act on the formal notices it received. Likewise, that the Pru admittedly intended to opt out of the Trial Class and pursue its claims in New Jersey – and would have done so, but for its gross negligence – certainly renders its claim of inadequacy of class counsel with respect to those claims, if not technically moot, manifestly unsuitable as a vehicle for this Court to examine the contours of the Due Process Clause in that regard. It is more than a little ironic that the Pru, having arrived at this stage with its choses in action

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(Cont'd)
record show the opposite. Seven notices of the Trial Class settlement were mailed to the Pru at the Pru's own buildings in May 1996, of which five were delivered. *See* Petition at 15a; 28a. Each of these Pru-owned buildings was on the Trial Class mailing list as a building that was leased in whole or in part to the federal government. Petition at 25a-28a. The Pru has admitted that the five buildings it owned to which notice was delivered were "Prudential offices." Brief for Appellants at 19. These Prudential offices, all of which were in buildings that might have contained or contain asbestos according to the class definition, had a direct nexus to the Trial Class action, since each was in a building identified by responsible federal agencies as having been leased during the class period by the Pru in whole or in part to the federal government. Petition at 23a-26a. The federal agencies, in turn, compiled the list of buildings used in the mailings, for class counsel and ultimately the trial court, from the names and addresses of their private landlords, like the Pru, which doubtless *supplied their respective addresses to the government as the best means of contacting the landlord on matters relating to the building under lease. See* Petition at 26a. The Pru's argument that class counsel did not employ the best practicable means is belied by the fact that the Pru, as landlord, contracted for the very means of notice that class counsel deployed, and deployed successfully insofar as these buildings of the Pru are concerned.

extinguished as a result of its counsel's inadequate representation, now seeks to turn this Court's attention to the adequacy of its representation as to those claims by *class counsel*.[8]

Accordingly, the facts of record unmask this petition as nothing more than the Pru's ill-conceived effort to obtain ordinary appellate relief from this Court "from its own failure to avoid a judgment entered against it." Petition at 10a. That relief was denied in the Pennsylvania courts, *inter alia*, because of the Pru's inexcusably careless inattention both to the trial court's formal notices and to the state's appellate practice-grounds fully independent of the Due Process Clause issues sought to be raised here. On these unique facts, neither of the Questions Presented is properly or effectively before this Court.

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8. In addition, the record fails to support the Pru's repeated assertions below and in its petition that it is an "absent class member" with respect to the Trial Class. To the contrary, the trial court found that "[i]f the need arose to develop a record it is more likely than not that the Pru would also be subject to this Court's jurisdiction on the ground of doing business in Pennsylvania." Petition at 30a. Since the Due Process Clause protections this Court has fashioned in the class action context, *see, e.g., Phillips Petroleum v. Shutts*, 472 U.S. 797, 810-813 (1985), address the perceived procedural needs of plaintiff class members who are not otherwise subject to the class action court's jurisdiction, *id.* at 812, the Pru's status in this regard would be a threshold issue in any examination by this Court of the Questions Presented. We submit that the trial court's observation casts an additional dark shadow over the suitability of this petition. Since it is the Pru who surely bears the burden of proving it is an "absent class member," it must also bear the negative consequence of a record on *certiorari* that suggests otherwise.

II. SINCE THE PETITION RESTS ON CONCEDEDLY "UNIQUE" FACTS THAT "WILL NEVER BE REPEATED" AND CONCERNS ONLY A SINGLE CLASS MEMBER'S EFFORTS TO TAKE ITSELF OUT OF THE CLASS ACTION JUDGMENT, THE PETITION IS A WHOLLY INAPPROPRIATE VEHICLE FOR CONSIDERATION OF THE CONSTITUTIONAL ISSUES PURPORTEDLY PRESENTED.

The Pru's petition neither implicates nor seeks to vindicate the Due Process rights of any of the absent Trial Class members. In the nationwide class actions this Court has recently reviewed, *e.g.*, *Shutts* and *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997), the rights of all absent class members were at issue in the respective grants of those petitions and in the Court's final decisions. By contrast, the Pru's petition seeks only to have this Court referee its private, parochial dispute with the four Trial Class defendants, in which, assertedly, only *the Pru's property interest*-not that of any other class member-was damaged by alleged unconstitutional state court process.

The improvidence of granting this petition merely to resolve this private dispute is illustrated by the fact that the only relief the Pru has consistently sought below is to be *itself* relieved of the underlying August 1996 final judgment approving the trial class settlement, while letting that judgment stand as to all other class members. As a result, the only relief that this Court could direct, on the assumption *arguendo* this Court granted the Petition and reversed the judgment below,[9] is to relieve the Pru of the binding effect

9. Notably terse as to the precise relief this Court should render, in the event the Pru succeeds, the petition (at 30) nonetheless (Cont'd)

of the August 1996 judgment compromising and extinguishing its New Jersey federal court claims.

The record is clear that the Pru has steadfastly avoided attacking the August 1996 judgment *vel non* on behalf of or for the benefit of all class members. That judgment approved the settlement, *without a single objection*, compromising and extinguishing all class claims, including the Pru's claims against the Trial Class defendants. The Pru failed to appeal that judgment within the applicable 30-day period, which thus became binding for *res judicata* and Full Faith and Credit purposes. The Pru's state court petitions, and the state appellate proceedings that followed, have all turned exclusively on the question whether the Pru, alone among all class members, is entitled to relief from that judgment, in the form of a decree that it is "Not A Class Member" or, alternatively, that the Pru's untimely September 20, 1996, opt-out request should nonetheless be deemed timely. With a single exception, not once in these state court proceedings did the Pru ever argue that the August 1996 judgment must be vacated in its entirety as to the settlement and compromise of the claims of *all class members*.

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states plainly that the Court should "reverse the judgment below," *i.e.*, the judgment of the Superior Court affirming the trial court's November 27, 1996, denial of the Pru's petition and supplement thereto. Petition at 20a, 67a. The record is clear that the relief the Pru sought in the trial court was expressly limited to its being relieved from the August 1996 final judgment. The Pru's lead counsel for its petition in the trial court described the relief sought by his client: "the relief sought by Prudential does not implicate the final judgment [in this case]." Letter from A. Raynes to Special Master Daniel Murphy (11/18/96); Volume IV of Reproduced Record, *Prince George Center v. United States Gypsum Co.*, 704 A.2d 41 (Pa. Super. 1997), at 1748a-1750a.

The sole exception – which in fact comes to nothing for present purposes – occurred on the Pru's appeal to the Pennsylvania Superior Court from the trial court's November 27, 1996, order. In the Pru's Brief for Appellants, the Pru, in the last of its four arguments,[10] sought to attack, not the November 27, 1996, order denying the Pru relief from the August 1996 judgment, but the August 1996 judgment itself. Brief for Appellants at 41-46. The argument heading was: "The Settlement Class Was Improperly Certified And Does Not Meet The Requirements Of The Pennsylvania Class Action Rules." The Pru explained that this fourth argument was the *only* argument it was making on appeal that sought to disturb the underlying final judgment (Brief for Appellants at 41):

> An analysis of this appeal establishes that there are numerous legal grounds for holding that Prudential was not and now should not be considered a class member. None of the preceding grounds for reversal requires disturbance of the class settlement or judgment. This ground does. This point, however, need not be reached if this Court reverses on any of the preceding grounds.

There are five reasons why the instant Petition is not and cannot be transformed into a vehicle for "disturbance of the class action settlement or judgment." First, the Pru not only failed to raise any attack in the trial court on the

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10. Arguments I, II, and III argued that the Pru alone should not be bound by the August 1996 judgment compromising and extinguishing the claims of the trial class. *See* Brief for Appellants at i.

judgment, it specifically disavowed any such relief.[11] Thus, no such attack on the August 1996 judgment (which itself was not appealed) was properly before the Superior Court on appeal from the lower court's November 27, 1996, post-judgment order. *See* Petition at 7a-8a (Superior Court "will only consider those issues properly raised in Prudential's petition filed September 30, 1996, and disposed of by the trial court's order of November 27, 1996 . . . ."). Second, the Pru's effort to raise this attack in the Superior Court was not repeated in its Petition for Allocatur before the Pennsylvania Supreme Court.[12] Thus, the Pru could not conceivably be held to have preserved any issue of a class-wide defect in the August 1996 judgment for review by this Court on *certiorari*.

Third, not a single word in the Pru's Questions Presented or its *certiorari* petition even implies that the August 1996 judgment is invalid as to the class as a whole. Fourth, any effort by the Pru to call into question in this Court the August 1996 judgment would have been invalid in any case: its fourth argument to the Superior Court *did not invoke federal constitutional grounds for vacating the entire August 1996 judgment*. Rather, the asserted bases advanced by the Pru for doing so were grounded solely in Pennsylvania law. *See* Brief for Appellants at 41-46. Fifth, the relief the Pru seeks here is limited to a reversal of the Superior Court's judgment, which judgment reaches only the validity of the trial court's November 27, 1996, order denying post-judgment opt-out relief to the Pru. Petition at 30.

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11. *See* n.9 *supra*.

12. *See* Allocatur Petition at 3 (Questions Presented for Review).

In light of the foregoing, the parameters of the real dispute presented by this post-judgment state court proceeding are confined to state law issues and are indisputably both narrow and fact-specific: as the Pru has admitted, "these facts will never be repeated." The consequences of the August 1996 judgment are at issue only insofar as they involve a *single class member's* efforts to cure "its own failure to avoid" that judgment. Petition at 10a. This case, therefore, hardly presents an appropriate vehicle (assuming one is needed now or ever) for this Court to consider whether "the enormous growth of nation-wide class actions in state courts makes it vital to define the constitutional protections against unfair or collusive settlements" (Petition at 9, first "reason for granting the writ") – of which there is no evidence whatsoever.

CONCLUSION

The Pru's assertedly valuable choses in action were not extinguished by any alleged violation of the Due Process Clause in the Pennsylvania state courts. Despite the Pru's failure of proof on the pivotal issue whether *it is* an absent class member, the Pru nonetheless received the full measure of the constitutional protections of adequate notice and adequate representation that are due an absent class member.[13]

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13. The joint opposition filed by co-respondents demonstrates beyond peradventure that the Pru failed properly to raise and preserve the issue, for this Court's review, of constitutional adequacy of representation of an absent class member. Respondents need not retrace that discussion here, but instead incorporate it by reference. We submit only that, in any event, the trial court, out of an abundance of caution, proceeded to answer every purported contention of the Pru that was even mentioned in its memorandum accompanying its petition for reconsideration, despite clear Pennsylvania law that such mention is insufficient to raise or preserve an issue. Petition at 51a-58a. Addressing this adequacy issue, the trial court found that building-owner asbestos plaintiffs like the Pru "are encountering greater difficulty establishing liability and damages," among other "difficulty-of-proof factors" putting the plaintiff class at "great risk," as recognized by the Eastern District of Pennsylvania (Judge Giles) in its approval of the 1995 class settlement in *In re Asbestos School Litigation*, 789 F.2d 996 (3rd Cir. 1986). Petition at 51a-52a. The trial court thus found that even if the Pru's New Jersey claims had been given specific consideration by class counsel and the trial court, "it would not have caused us to reject the settlements on the ground of inadequacy." Petition at 52a. Moreover, the Pru has pointedly ignored the fact that the Trial Class settlement was reached after nearly 10 years of hard-fought litigation by experienced class counsel – aware of both the outcomes of litigated asbestos-in-building cases and the great risks of trial; and after protracted arms-

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In truth, the record here is redolent with gross corporate carelessness and inadequate representation by professional employees and agents of the Pru. This Court's writ cannot be used to rescue the Pru "from its own failure to avoid a judgment entered against it." The petition must be denied.

Respectfully submitted,

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length settlement negotiations and numerous settlement conferences presided over by the trial court, which approved the settlement, *without objection*, based upon all relevant factors under Pennsylvania law (which mirrors federal class action settlement law). The Pru also ignores the trial court's observation that in May 1995 the "Pru was contemplating the possibility it would be better off as a member of the trial class than as an individual litigant." Petition at 52a.